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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1770

MILTON SILVERMAN AND SAM NORBER, PETITIONERS

v.

UNITED STATES OF AMERICA

No. 73-6676

LEE STEPHENS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Silverman-Norber Pet. App. B, pp. 45-66; Stephens Pet. App. A2-A13) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on February 28, 1974. Petitions for rehearing were denied on April 5, 1974. The petition for a writ of certiorari

in No. 73-6676 was filed on May 6, 1974. The petition for a writ of certiorari in No. 73-1770 was filed on May 25, 1974, and is therefore out of time under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the district court's action in quashing the government's subpoena of a co-conspirator who indicated that he would assert the privilege against self-incrimination violated petitioners' confrontation rights where statements attributed to the co-conspirator were admitted under the co-conspirator exception to the hearsay rule and where petitioners neither called him as a witness nor objected to the district court's action (raised by all petitioners).

2. Whether the government failed in its duty to correct false testimony by one of its witnesses as to his present address (raised by all petitioners).

3. Whether the district court abused its discretion in refusing to strike the testimony of a government witness after sustaining his claim of privilege against self-incrimination made in response to questions on cross-examination which the district court found to be collateral to the issue being tried (raised by all petitioners).

4. Whether an affidavit for a search warrant established probable cause (raised by Silverman and Norber).

5. Whether the right to a speedy trial was denied (raised by Silverman).

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Michigan, petitioners and co-defendant Bartkus were convicted of conspiracy to transport stolen merchandise in interstate commerce, and, with the exception of Stephens, of substantive offenses, in vio-

lation of 18 U.S.C. 371, 2314, and 2315.[1] Stephens was sentenced to two years' imprisonment; Silverman to concurrent terms of five and eight years' imprisonment, with immediate eligibility for parole under 18 U.S.C. 4208 (a)(2); and Norber to concurrent terms of five years' imprisonment, also with immediate eligibility for parole. The court of appeals affirmed as to petitioners but reversed and remanded as to Bartkus (Pet. App. A3-A13 in No. 73-6676; Pet. App. B, pp. 45-66 in No. 73-1770. Page references hereinafter are to the latter).

In mid-January 1970, a trailer load of aspirin and other non-prescription drug products shipped by rail from New Jersey was stolen from the Penn-Central yard in Chicago. The trailer itself was found a few days later. Co-conspirator Caracappa, an independent trucker, testified for the government that on or about January 20, 1970, defendant Kahn,[2] also an independent trucker, contacted him about transporting a trailer of stolen merchandise to Detroit. Kahn introduced Caracappa to Bartkus. At this meeting Kahn told Caracappa that Bartkus was a dealer in stolen merchandise and that the cargo was stolen aspirin but would be on a legitimate trailer. Caracappa agreed to take the trailer to Detroit. On the following day, Caracappa picked up the trailer and drove to Detroit, Kahn accompanying him most of the way. Caracappa verified that the load was aspirin. Pursuant to Kahn's instruction, Caracappa waited at a truck stop in Detroit, where he was approached by petitioner Stephens, who told him, "I'm your man here in Detroit." Caracappa parked his truck and went to Stephens' house, where Kahn, Bartkus, and petitioner Norber later arrived. There was a discussion about the ownership of the cargo. (Pet. App. B, pp. 46-48).

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[1]The first trial of these defendants had ended in jury disagreement.

[2]Kahn entered a plea of guilty prior to trial.

On January 22, 1970, the cargo was unloaded at a Detroit warehouse in the presence of Stephens, Kahn, Norber, and Bartkus. Norber gave Kahn an envelope containing money. Cartons of aspirin were thereafter transferred to the storeroom of the Castle City Furniture Company in Detroit. Deliveries of aspirin were subsequently made by petitioners from the Castle City Furniture Company to dealers in Cincinnati. Some of the cartons were identified as coming from the stolen shipment. On February 18, 1970, petitioner Silverman and another man were arrested by Michigan authorities while driving a load from the Castle City Furniture Company. Pursuant to a search warrant thereafter issued, cartons of aspirin were seized from their truck and from the Castle City Furniture Company (Pet. App. B, pp. 48-51).

ARGUMENT

1. During Caracappa's testimony as to his initial meeting with Kahn and Bartkus to discuss transportation of the stolen load from Chicago to Detroit, defense counsel contended that the government should call Kahn as a witness. In response to the court's inquiry, the Assistant United States Attorney stated that Kahn, who had pleaded guilty but had not yet been sentenced, could not be made to testify. Although defense objections then and later were denied, the government subsequently sought to moot the issue by subpoenaing Kahn as a witness. The court advised Kahn of his right to remain silent and appointed the attorney who had represented him at the previous trial of this case to represent him (Tr. 677-682, 714-717, 2610-2611). Kahn's attorney stated that his client, if called to the stand, would claim the privilege against self-incrimination, and he moved to quash the government subpoena (Tr. 2761-2763). Stephen's attorney then contended that, if Kahn had the right to remain silent, the government should not call him to the stand (Tr. 2774).

Silverman and Norber did not contest this position or question its correctness. The court sustained the claim of privilege and quashed the subpoena without requiring that Kahn take the stand and claim his privilege. None of the petitioners at any time sought to have Kahn placed on the stand, either as a government witness or as a defense witness.

The court of appeals did not question the admissibility of Caracappa's testimony, but it held that the district court erred in granting Kahn's motion to quash the subpoena calling him as a witness. Relying on its opinion in *United States* v. *Seavers*, 472 F. 2d 607 (C.A. 6), the court of appeals held that the district court should have required Kahn to take the stand, and if Kahn asserted the privilege in response to certain questions, the district court should then have determined whether the privilege was validly invoked (Pet. App. B, p. 55). The court of appeals held, however, that the district court's error affected the fundamental rights of defendant Bartkus only.

Petitioners contend that the district court's action required reversal of their convictions. This contention is without merit. As noted above, at trial the defendants objected to Caracappa's testimony on the ground that the government was obligated to call Kahn as a witness. This objection was unsound; the testimony was admissible under the co-conspirator exception to the hearsay rule. which by definition permits the admission of statements without the necessity to produce the declarant. See *Dutton* v. *Evans*, 400 U.S. 74, 81; *United States* v. *Nixon*, No. 73-1766, decided July 24, 1974, slip op. p. 16. To the extent that the petitioners' claim (or the court of appeals' decision as to Bartkus) is based on an assumption that the government had a duty to call Kahn as a witness, it is incorrect.

While the government had no obligation to call Kahn as a witness, petitioners were of course not precluded from doing so. Having failed to call Kahn as a witness, petitioners cannot now claim that their rights to confront and cross-examine him were abridged. Indeed, we submit that there was no error as to the defendant Bartkus. Assuming that the procedure outlined by the court of appeals should have been followed if Bartkus had called Kahn as a witness, Bartkus did not do so, and the court of appeals' reliance on *Chambers* v. *Mississippi*, 410 U.S. 284, in which a defendant was precluded from calling a witness, is misplaced.

2. Caracappa testified on cross-examination that he was living in Kansas City. At the first recess after the conclusion of his testimony, the prosecutor advised defense counsel and the court that this was not true and that Caracappa was attempting to keep his present location hidden. He offered to recall the witness so that the matter could be explored in the presence of the jury. The defense refused to agree to the recall, in view of the assistant's statement that he would ask Caracappa his reason for giving a false answer (Pet. App. B, pp. 58-59). The court below correctly held that there was no error, in view of the defense rejection of the government's offer to recall the witness and the additional consideration that Caracappa's correct residence was relevant only to allow exploration of his reputation in that community. Since his removal from Chicago was so recent that he would not have established a reputation in his new community, the false statement was immaterial.

3. On cross-examination Caracappa refused on Fifth Amendment grounds to answer certain questions as to a

different load of aspirin which he had hauled in 1970.[3] Petitioners contend that this line of questioning was necessary to test the credibility of the witness, that Caracappa had waived any constitutional right to remain silent by testifying as to the 1970 delivery before the grand jury, and that the witness's entire testimony should therefore have been stricken. The court of appeals, relying upon *United States* v. *Cardillo*, 316 F. 2d 606 (C.A. 2), certiorari denied, 375 U.S. 822, correctly held that this was a matter collateral to the issue being tried and to the direct testimony and that it was therefore within the discretion of the trial court to refuse to strike Caracappa's testimony. The court also pointed out that the government made no effort to conceal the witness's past and current problems with the law and that his "flawed character" was fully brought to the attention of the jury (Pet. App. B, pp. 55-57).

4. The affidavit for a search warrant, made by a Michigan state police detective, stated that the affiant had reason to believe that approximately 200 cartons of Bayer aspirin and Vanquish tablets were concealed on certain property and in a vehicle, both of which were thoroughly described; that the cartons had been in a trailer removed from the Penn Central terminal at 361 West 47th Street in Chicago between certain hours on January 15, 1970; that the shipment had been made from Glenbrook Laboratories in Trenton, New Jersey, to their warehouse in Evanston; that Lance Penney, District Sales Manager for Glenbrook,

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[3]Caracappa also invoked the privilege when asked the identity of the person to whom he had sold three cases of aspirin that he had stolen from the trailer between Chicago and Detroit. However, as the court below noted, "there was no objection to his refusal to answer this question and it is not before us" (Pet. App. B, p.56). Although petitioners now question the propriety of this claim of privilege, review would be inappropriate in view of the failure to object below.

advised that products that reach the warehouse have distributors' names stenciled on each carton and that an absence of such a stencil would indicate that the shipment had not reached a warehouse; that on January 26, 1970, a named state detective had observed approximately fifty cases of Bayer aspirin being loaded from the Castle City Furniture Company at a described address in Detroit into a described vehicle owned by Milton Silverman, doing business as Scott Incorporated; that the detective did not see any markings on the cartons indicating the consignee; that surveillance had disclosed the movement of this vehicle to a described consignee in Cincinnati, where 116 cartons of Bayer aspirin had been unloaded at a named date and hour; that the named manager of the consignee had stated that he purchased over 100 cartons of Bayer aspirin from Silverman on said date and that the sales price was approximately 20 percent below wholesale; that FBI agents examined two remaining cartons of this shipment on January 29 and found no consignee name stenciled on the cartons, nor any date code batch number; that Lance Penney advised that Milton Silverman was not known to be a purchaser of products from the midwest branch of Glenbrook Laboratory and was not known to be a dealer in drugs. Details were further given as to surveillance of loading of Bayer products into the described vehicle immediately prior to the arrest of Silverman on charges of possessing stolen property as he and another were driving the vehicle away (Pet. App. D, pp. 68-71).

Silverman and Norber contend that this affidavit contained "at least six false statements" and that "the collateral allegations simply could not have supported probable cause, standing alone" (Silverman and Norber Pet. 30-31). They do not state which of the allegations they claim to be false, nor do they assert that there was

any intentional misrepresentation. In the absence of intentional misrepresentation, the warrant will be sustained if the remaining allegations support the magistrate's finding of probable cause. *United States* v. *Thomas*, 489 F. 2d 664, 668-672 (C.A. 5). Certainly, in view of petitioners' vague and conclusory claims of falsity, the affidavit adequately sets forth facts and circumstances upon which a prudent person could reasonably base a belief that the merchandise in question had been stolen in interstate commerce. Cf. *United States* v. *Ventresca*, 380 U.S. 102, 108; *Harris* v. *United States*, 403 U.S. 573. The low price alone was a convincing indication that the goods were stolen. *United States* v. *Werner*, 160 F. 2d 438 (C.A. 2).

5. There is no substance to Silverman's claim that he was denied a speedy trial. He was arrested by Michigan State Police on February 19, 1970. The state proceedings were supplanted by a federal indictment returned on April 7, 1970. Investigation of the charges against Silverman and the individual with whom he was arrested revealed the implication of the other defendants, resulting in the return of a superseding indictment on August 9, 1971. Between that date and November 29, 1971, there were numerous proceedings, as shown by pages 1-4 of a certified copy of the Docket, which we are lodging with the Court. On the latter date, notice of trial for January 4, 1972, was filed. On January 3, 1972, Silverman filed motions to adjourn the trial, to dismiss, for discovery, to suppress evidence and to quash the indictment, which were overruled on the same date. On the following day, the first trial commenced (Docket 2). On February 9, 1972, the jury was dismissed for failure to reach an agreement (Docket 2a). On April 19, 1972, the case was reassigned to Judge Keith, and on April 28 a pre-trial conference was held. On May 11, notice of trial for June 6 was given.

On May 22, Silverman's motion to suppress evidence was heard and denied (Docket 3). On June 6, the day set for trial, Silverman sought a continuance for alleged non-receipt of additional portions of the testimony at the first trial. This motion was denied and the case proceeded to trial (Docket 5).

It is apparent, especially with reference to Silverman's efforts to delay both trials, that he was not denied a speedy trial. *Barker* v. *Wingo*, 407 U.S. 514. Cf. *Moore* v. *Arizona*, 414 U.S. 25. Moreover, the only significant period of delay not attributable to the action of petitioner or necessary pre-trial procedures was between the date of petitioner's arrest and the return of a superseding indictment. This delay was fully justified by the investigation and was not objected to at the time.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petitions for writs of certiorari should be denied.

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